NO. 83-1773

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

KATHLEEN FILERSON

AND

GEORGE GARDNER,

Petitioners,

vs.

THE STATE OF OHIO,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIRST APPELLATE DISTRICT OF OHIO.

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QUESTIONS PRESENTED FOR REVIEW

I

WHETHER THE UNITED STATES SUPREME COURT WILL GRANT A PETITION FOR WRIT OF CERTIORARI TO A STATE COURT IN ORDER TO CONSIDER A CLAIMED VIOLATION OF A FEDERAL CONSTITUTIONAL RIGHT, WHEN SUCH A CLAIM WAS NOT PRESENTED OR CONSIDERED IN THE STATE APPELLATE COURT OR IN THE STATE SUPREME COURT.

II

WHETHER THE UNITED STATES SUPREME COURT WILL GRANT A PETITION FOR WRIT OF CERTIORARI TO A STATE COURT IN ORDER TO REVIEW A WEIGHT OF THE EVIDENCE CLAIM, WHERE THE CONVICTION IS SUPPORTED BY SUBSTANTIAL EVIDENCE OF PROBATIVE VALUE AS TO EACH ELEMENT OF THE CRIME CHARGED, SO AS TO ESTABLISH PROOF OF GUILT BEYOND A REASONABLE DOUBT.

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OPINIONS BELOW

The opinion of the Ohio First District Court of Appeals, affirming both petitioners' conviction, released November 9, 1983, is accurately set forth in the appendix to petitioners' brief. The decision of the Ohio Supreme Court refusing to review this case, dated February 1, 1984, is correctly set forth in the appendix to petitioners' brief.

JURISDICTION

Petitioners invoke the jurisdiction of this Court under 28 U.S.C. 1257 (3). As to the first two questions presented, respondent denies that jurisdiction is available in this Court. Neither of those questions were presented in the State Courts. Petitioners' third question presented does raise an issue presented in the State Courts.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the Constitution of the United States:

> "The Sixth Amendment provides, in pertinent part:
>
> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; . . ."

The Fourteenth Amendment to the Constitution of the United States:

> "The Fourteenth Amendment provides, in pertinent part:
>
> . . . . No State shall . . . deprive any person of life, liberty, or property, without due process of law."

Ohio Rules of Evidence,

> Rule 701: Opinion Testimony by Lay Witnesses
>
> "If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of his testimony or the determination of a fact in issue."

Rule 704: Opinion on Ultimate Issue

"Testimony in the form of an opinion or inference otherwise admissible is not objectionable solely because it embraces an ultimate issue to be decided by the trier of fact."

Ohio Revised Code:

Sec. 2925.01 (G)

" 'Cultivate' includes planting, watering, fertilizing, or tilling."

Sec. 2925.03 (A) (2), (3), (F)

" (A) No person shall do any of the following

. . . .

(2) Prepare for shipment, ship, transport, deliver, prepare for distribution, or distribute a controlled substance, when the offender knows or has reasonable cause to believe such drug is intended for sale or resale by the offender or another;

(3) Cultivate, manufacture, or otherwise engage in any part of the production of a controlled substance.

. . . .

(F) It shall be an affirmative defense, as provided in section 2901.05 of the Revised Code, to a charge under this section for possessing a bulk amount of a controlled substance or for cultivating marijuana that the substance which gave rise to the charge is in such amount, in such form, or is prepared, compounded, or mixed with substances which are not controlled substances in such a manner, or is possessed or cultivated in any other circumstances whatsoever as to indicate that the substance was solely for personal use."

STATEMENTS OF THE CASE

a) Procedural Posture

Petitio ers Eilerson and Gardner were arrested on July 16, 1982, on drug charges. A preliminary hearing was held on July 22, 1982, and petitioners were bound over to the grand jury. On August 17, 1982, the Hamilton County Grand Jury returned indictment number B-823425. This instrument charged petitioners Eilerson and Gardner with three counts of Trafficking in Drugs. Petitioners were arraigned on August 20, 1982, and entered pleas of not guilty. Petitioners were tried jointly to a jury on November 1, 2, 3 and 4, 1982. At the conclusion of trial petitioners were each found guilty on two counts of Trafficking. Petitioner Eilerson received a suspended sentence and was placed on five years probation. Petitioner Gardner received terms of 1-5 years and 2-5 years, and those terms were made to run consecutively. On November 9, 1983, the Ohio First District Court of Appeals affirmed appellants' convictions. On February 1, 1984, the Ohio Supreme Court declined to review the case.

b) Facts

Petitioner Eilerson owned and occupied a single family residence located at 3159 Dickinson Road, in the Green Township area of Hamilton County. Living with her at this address was the petitioner George Gardner, a.k.a. George Dixon.

During the summer of 1982, authorities in Green Township began to receive complaints about the condition of the premises at 3159 Dickinson Road. This was a lot in a subdivision, surrounded by houses on similar, typically suburban lots. The gist of the complaints was that the yard was not being cared for, that it was totally overgrown,

and was a detriment to the neighborhood. Raymond Schlinkert, the township administrator, drove past the property and confirmed that the complaints were true. (T.p. 108) That same day Schlinkert sent a letter to Eilerson, asking her to clean up the premises. On July 5, 1982, he received a hand delivered letter from Ms. Eilerson, indicating she had removed all offending plants from the premises. (Exhibit #1 at trial) In fact, Eilerson had done little or nothing to her yard, and it remained in what she called a "natural" state. Schlinkert then sent Ms. Eilerson a note, asking that she come to a Township Trustee meeting on July 12th, 1982. Ms. Eilerson and co-defendant Gardner appeared at the meeting, and defendant Eilerson gave a statement indicating that she knew what was in her yard, that, in fact, she and Gardner tended and maintained the yard in that fashion, and that Gardner spent about 20-30 hours a week maintaining the yard. (T.P. 110).

Subsequently, on July 13th, Schlinkert and Robert Weitzek, the Mack Fire Chief, went to the Dickinson Road address, and the Fire Chief cited Eilerson as a result of what he observed. At that time the two men had a discussion with Eilerson about her yard. At the conclusion of the discussion Eilerson refused to allow them to inspect her rear yard. (T.p. 126)

The dispute between Eilerson and the Green Township authorities received much media coverage, most of it sympathetic to the defendants. Eilerson was interviewed, her property was filmed, and the film was televised. Apparently the televised film showed an extensive amount of marijuana growing in the rear yard, and someone recognized it, and called the Regional Enforcement Narcotics Unit (R.E.N.U.). (T.p. 47) In response R.E.N.U. Agent Clayton Buffington went out and personally observed the rear yard

at 3159 Dickinson Road. He was able to see marijuana growing there, and as a result obtained a search warrant for the house and premises. The search warrant was executed on July 16th, 1982. During the course of the search, R.E.N.U. agents removed 323 growing marijuana plants from the rear yard. A few were as high as ten feet, some were five to six inches high, while the majority were in the three to four foot range. Inside the house the officers recovered about 23 baggies of marijuana. Some of these were in the refrigerator, while others were found under the sink. (T.p. 149) Various other drug related items and marijuana residue or cigarettes were also found inside the home. The total weight of all the marijuana recovered was in excess of 600 grams.

As a result of these events Eilerson and Gardner were each charged with three counts of Trafficking in Drugs. The first count charged preparation for distribution and referred to the marijuana found inside the home. The second count charged cultivation, and referred to 323 plants growing in the rear yard. The third count charged possession exceeding three times bulk amount, and referred to the combined weight of all the marijuana. The jury was charged that if the defendant was found guilty of the first two counts, she could not be found guilty on the third count. The jury did find Eilerson guilty on the first and second counts, and defendant was given a suspended sentence and placed on probation. Petitioner Gardner was likewise found guilty, and he was given a term of imprisonment.

REASONS FOR DENYING THE WRIT

I

ON A PETITION FOR WRIT OF CERTIORARI DIRECTED TO A STATE COURT, CERTIORARI WILL BE DENIED WHERE THE PETITIONER SEEKS TO RAISE ISSUES WHICH WERE NOT RAISED OR PRESENTED EITHER TO THE STATE APPELLATE COURT OR TO THE STATE SUPREME COURT

In their first two questions presented, petitioners argue that, 1.) the due process clause of the fourteenth amendment is violated by the use of lay opinion testimony by a police officer as to an essential element of the crime charged, and that, 2.) the use of lay opinion testimony by a police officer as to whether marijuana is packaged for distribution is a violation of their sixth amendment rights to confront witnesses against them. Neither of these federal constitutional issues were presented in either the Ohio Appellate Court or the Ohio Supreme Court.

Appendix "A" to this brief is the entire argument presented in the Ohio Court of Appeals by petitioner Eilerson on the lay opinion question. Appendix "B" to this brief contains the propositions of law presented to the Ohio Supreme Court by petitioner Eilerson. Appendix "C" to this brief is the entire argument presented in the Ohio Appellate Court by petitioner Gardner on the lay opinion question. Appendix "D" to this brief contains the propositions of law presented to the Ohio Supreme Court by petitioner Gardner. As can be seen, neither petitioner raised these constitutional issues in the Appellate Court. Further, and even more important, neither petitioner raised any aspect whatsoever of the lay opinion issue in the Ohio Supreme Court.

It is well settled that this Court does not have jurisdiction to grant a Petition for Writ of Certiorari to consider issues which were not presented to the State Courts. *Beck* v. *Washington*, 369 U.S. 541 (1962); *Amalgamated Food Employees Union* v. *Logan Valley Plaza*, 391 U.S. 308 (1976); *Cardinale* v. *Louisiana*, 394 U.S. 437 (1968); *Street* v. *New York*, 394 U.S. 576 (1968); *Fuller* v. *Oregon*, 417 U.S. 40 (1974); Rules of the Supreme Court, Rule 23 (1) (f). In *Fuller* this Court noted:

> "The petitioner's brief also raises, without extended discussion, various due process claims that imposition of the conditional obligation to repay was made without sufficient notice or hearing. Since these contentions appear not to have been raised in the state courts, and were not discussed by the Oregon Court of Appeals, we need not reach them here. '[T]his Court has stated that when . . . the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary.' Street v. New York, 394 U.S. 576, 582, 89 S. Ct. 1354, 1360, 22 L.Ed. 2d 572."

Respondent submits that neither of the first two questions presented by these petitioners are properly before this Court.

REASONS FOR DENYING WRIT

II

WHERE THE EVIDENCE ADDUCED AT TRIAL BY THE PROSECUTION IS SUFFICIENT TO ESTABLISH EACH ELEMENT OF THE CRIME CHARGED BEYOND A REASONABLE DOUBT, AND THE STATE REVIEWING COURTS APPLY SUCH A STANDARD ON REVIEW, A CONVICTION IS NOT CONSTITUTIONALLY INFIRM AS BEING CONTRARY TO THE WEIGHT OF THE EVIDENCE.

Petitioners cite to *Taylor* v. *Kentucky*, 436 U.S. 478 (1978) and *Jackson* v. *Virginia*, 443 U.S. 307 (1979) for the proposition that reviewing courts cannot summarily reject weight of the evidence claims as long as there is some evidence of the crime charged. Petitioners urge and respondent concurs, that reviewing courts should judge weight of the evidence claims on a reasonable doubt, or a *near certitude* basis. Ohio has evolved such a standard for review of weight of the evidence claims. *State* v. *Eley*, 56 O.S. 2d 169 (1978). The syllabus paragraph from *Eley* reads as follows:

> "A reviewing court will not reverse a jury verdict where there is substantial evidence upon which a jury could reasonably conclude that all the elements of offense have been proven beyond a reasonable doubt."

The evidence adduced at petitioners' trial was more than adequate to convict them, with proof beyond a reasonable doubt.

1.) Evidence as to Petitioner Eilerson

The evidence here was that petitioner Eilerson owned and lived in the premises at 3159 Dickinson Road. Growing in her yard were 323 marijuana plants. She testified that she did grow these plants, and that she used them for tea, pies, and also to smoke. Her claim was not that she did not cultivate them, but rather that she did not know what she was growing. Eilerson claimed she though the plant was "baby mimosa." Inside her home mere marjuana cigarettes, seeds, and smoking paraphernalia, further evidence that she was specifically cultivating marijuana. Also inside her house were 23 separately packaged baggies of marijuana. Expert testimony from Agent Thornton indicated that this was how marijuana was commonly packaged for distribution. This was more than adequate to get the first count (Trafficking, preparation for distribution) to the jury.

Defendant argues that she could not be convicted of cultivation because there was no evidence that she tended her marijuana plants, i.e., no evidence of tilling, watering, etc. This, even if true, would not negate the conviction. "Cultivate" is defined in R.C. 2925.01, *Definitions*, section (G), as follows:

> "(G) Cultivate includes planting, watering, fertilizing, or tilling."

The evidence here was that the defendant had 323 plants growing in her rear yard. She did not live on a farm, she lived in a suburban tract home. The plants were growing right outside her door. It is very obvious that she planted them, and this is sufficient to show cultivation.

2.) Evidence as to Petitioner Gardner

Petitioner Gardner was ch rged in the first count with a

violation of Revised Code 2925.03 (A) (2). That offense is defined as follows:

> "(A) No person shall knowingly do any of the following:
>
> (2) Prepare for shipment, ship, transport, deliver, prepare for distribution, or distribute a controlled substance, when the offender knows or has reasonable cause to believe such drug is intended for sale or resale by the offender or another."

In the third count petitioners were charged with a violation of 2925.03 (A) (3), which is defined as:

> "(3) Cultivate, manufacture, or otherwise engage in any part of the production of a controlled substance;"

In support of these charges the state introduced evidence as follows. Petitioner Gardner [petitioner's true name is Dixon, the alias 'Gardner' was apparently adopted to describe his activities] lived at the Dickinson Road address with petitioner Eilerson. Testimony at trial was that Gardner tended the "natural lawn" which was maintained there. When police executed the search warrant they recovered 323 growing marijuana plants from the rear yard. The plants varied in size from a few inches to 10 feet in height. The majority were in the 3-4 foot range. Inside the house police recovered 23 bags of marijuana. These bags were stored in the refrigerator and in other areas. Marijuana, seeds and drug equipment were found throughout the house. Expert testimony from Agent Thornton indicated that marijuana was commonly packaged and sold in the form the substance was found in the defendant's home. Respondent submits that this evidence was more than sufficient to sustain the conviction.

CONCLUSION

Respondent submits that for the foregoing reason the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX "A"

PETITIONER EILERSON'S CLAIM OF ERROR AND ARGUMENT AS TO LAY OPINION IN OHIO APPELLATE COURT

FIRST ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED TO THE SUBSTANTIAL PREJUDICE OF APPELLANT BY PERMITTING THE STATE OF OHIO TO INTRODUCE A LAY OPINION THAT EVIDENCE SEIZED WAS PREPARED FOR DISTRIBUTION IN SUPPORT OF ITS FIRST COUNT OF THE INDICTMENT.

ISSUE PRESENTED FOR REVIEW AND ARGUMENT

EVIDENCE IN THE FORM OF AN OPINION ON THE ISSUE OF PREPARATION FOR DISTRIBUTION BY THE PROSECUTION FOR A VIOLATION OF SECTION 2925.03 (A) (2) OF THE OHIO REVISED CODE WITHOUT A SUFFICIENT FACTUAL FUNDAMENT.

Agent Thornton of the Regional Enforcement Narcotics Unit was permitted over Appellant's counsel's objection to testify to the best of his knowledge that the bags of marijuana found in Appellant's residence were in the form "marijuana dealers bag their marijuana in them" and were "prepared for distribution". (T.p. 183, 184) Over Appellant's strenuous objection the trial court admitted such testimony citing Rule 701 and 703 of the Ohio Rules of Evidence. Agent Thornton at no time gave testimony sufficient to qualify as an expert for purposes of the opinion ultimately given at trial. (T.p. 182, 183) The effect of this testimony coupled with the errors complained of in Appel-

lant's Fourth Assignment of Error permitted the jury to infer guilt as to trafficking by preparation for distribution without any factual fundament whatsoever. Further, this opinion evidence was so highly prejudicial and so lacking in probative value that it should have been excluded. Rule 403 (A) of the Ohio Rules of Evidence.

APPENDIX "B"

PETITIONER EILERSON'S PROPOSITIONS OF LAW IN OHIO SUPREME COURT

PROPOSITION OF LAW NO. 1

WHERE A DEFENDANT IN A CRIMINAL CASE SEEKS TO OFFER PROOF IN SUPPORT OF AN AFFIRMATIVE DEFENSE THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION REQUIRES THAT SUCH DEFENDANT BE PERMITTED TO OFFER THE TESTIMONY OF WITNESSES AND TO GIVE EVIDENCE IN SUPPORT OF SUCH AFFIRMATIVE DEFENSE AND A DENIAL OF THAT RIGHT CONSTITUTES A DENIAL OF DUE PROCESS IN VIOLATION OF SUCH CONSTITUTIONAL MANDATE.

PROPOSITION OF LAW NO. 2

A STATE COURT CONVICTION WHICH IS TOTALLY DEVOID OF EVIDENTIARY SUPPORT VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND A CONVICTION BASED UPON MINIMAL OR NO EVIDENCE VIOLATES SUCH CONSTITUTIONAL MANDATE.

APPENDIX "C"

PETITIONER GARDNER'S CLAIMS OF ERROR AND ARGUMENT IN COURT OF APPEALS AS TO LAY OPINION

THIRD ASSIGNMENT OF ERROR

THE TRIAL COURT SUBSTANTIALLY ERRED TO THE PREJUDICE OF DEFENDANT IN PERMITTING THE STATE TO OFFER OPINION TESTIMONY THAT THE CONTRABAND SEIZED FROM THE DEFENDANT WAS INTENDED FOR SALE.

FIRST ISSUE PRESENTED FOR REVIEW AND ARGUMENT

WHEN OBJECTED TO BY THE DEFENDANT, THE TRIAL COURT MAY NOT PERMIT A LAY OPINION THAT THE MARIJUANA WAS INTENDED FOR DISTRIBUTION.

During the course of the state's case, the prosecutor asked Thornton whether or not the marijuana seized from the Eilerson residence in plastic baggies was in a form that marijuana dealers package their marijuana and whether or not the marijuana seized, in his opinion, was prepared for distribution. (T.p. 183). Defense counsel objected to the opinion testimony. The trial court overruled the objection and stated that the evidence was admissible as a lay opinion under Rule 701, *Ohio Rules of Evidence*. (T.p. 183).

Rule 701, *Ohio Rules of Evidence*, provides that if a witness is not testifying as an expert, his testimony in the form of an opinion or inference is limited to those opinions or inferences which are; 1) rationally based on the percep-

tion of the witness, and; 2) helpful to a clear understanding of the testimony for the determination of a fact and issue. The staff note to Rule 701 clearly states that the rule is a codification of Ohio law as it developed prior to the adoption of the rules of evidence. That rule is that only facts can be given in evidence by a non-expert witness subject to a narrow exception that the opinion must be necessary to the fact finder as the only efficient proof of fact. *Village of Shelby* v. *Clagget*, 46 Ohio St. 459 (1889). In this case, it was inappropriate for the judge to permit a lay opinion as to whether or not the substance was prepared for distribution. The jury had all of the evidence before it to which it could make it's own determination as to that ultimate issue, i.e., preparation for distribution. The lay opinion as to that issue was unnecessary. The introduction of the evidence was extremely prejudicial. The evidence should have been excluded pursuant to Rule 403 (A), *Ohio Rules of Evidence*.

SECOND ISSUE PRESENTED FOR REVIEW AND ARGUMENT

WHERE THE ARRESTING OFFICERS HAVE SEIZED MARIJUANA AND INTRODUCED THE MARIJUANA INTO EVIDENCE AT TRIAL IN SUBSTANTIALLY THE FORM IN WHICH IT WAS RECEIVED, THE TRIAL COURT MAY NOT PERMIT EXPERT TESTIMONY THAT THE MARIJUANA WAS PREPARED FOR DISTRIBUTION.

In addition to admitting the testimony of Agent Thornton that the marijuana seized was prepared for distribution, as a lay opinion, the court also ruled that the testimony could be received as an expert opinion, pursuant to Rule 703, *Ohio Rules of Evidence*. (T.p. 183). Appellant sub-

mits that the opinion offered by Agent Thornton was outside of his field of expertise and was not helpful to the jury in deciding the ultimate issue. Appellant further submits that the testimony was extremely prejudicial to the Defendant and should have been excluded by the trial court pursuant to Rule 403, *Ohio Rules of Evidence*.

APPENDIX "D"
PETITIONER GARDNER'S PROPOSITION OF LAW IN OHIO SUPREME COURT

PROPOSITION OF LAW NO. 1

WHERE A DEFENDANT IN A CRIMINAL CASE SEEKS TO OFFER PROOF IN SUPPORT OF AN AFFIRMATIVE DEFENSE THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION REQUIRES THAT SUCH DEFENDANT BE PERMITTED TO OFFER THE TESTIMONY OF WITNESSES AND TO GIVE EVIDENCE IN SUPPORT OF SUCH AFFIRMATIVE DEFENSE AND A DENIAL OF THAT RIGHT CONSTITUTES A DENIAL OF DUE PROCESS IN VIOLATION OF SUCH CONSTITUTIONAL MANDATE.

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A STATE COURT CONVICTION WHICH IS TOTALLY DEVOID OF EVIDENTIARY SUPPORT VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND A CONVICTION BASED UPON MINIMAL OR NO EVIDENCE VIOLATES SUCH CONSTITUTIONAL MANDATE.

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